TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement of the Case	3
Argument	
I—The decision below is clearly correct and there is no conflict of authority	6
II—The 1971 Sound Recording Amendment and the *Goldstein* decision are not controlling	13
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Aeolian Co. v. Royal Music Roll Co., 196 Fed. 926 (W.D.N.Y. 1912) 11

Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969), *cert. denied*, 398 U.S. 960 (1970) 10

Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) 11, 12

Clark v. Uebersee Finanz-Korp., 332 U.S. 480 (1947) 10

Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972) 2, 3

PAGE

Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974), *cert. denied*, —— U.S. ——, 42 L.Ed. 2d 819 (Jan. 20, 1975) 2, 3, 6, 7, 8, 13, 14

Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975) 3, 9, 10, 13, 14
Fame Publishing Co., Inc. v. S&S Distributors, Inc., 363 F. Supp. 984 (N.D. Ala. 1973) 10

Goldstein v. California, 412 U.S. 546 (1973) 7, 10, 13, 14, 15, 16

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) 12

Shaab v. Kleindienst, 345 F. Supp. 589 (D.D.C. 1972) 9
Shilkret v. Musicraft Records, Inc., 131 F.2d 929 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 (1943) 10
Spokane & Inland R.R. v. United States, 241 U.S. 344 (1916) 10
Standard Music Roll Co. v. F.A. Mills, Inc., 241 Fed. 360 (3d Cir. 1917) 7

United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 12
United States v. Katz, 271 U.S. 354 (1926) 12
United States v. Kirby, 7 Wall. (74 U.S.) 482 (1868) 12
United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 14
USV Pharmaceutical Corp. v. Weinberger, 412 U.S. 655 (1973) 10

PAGE

Statutes:

17 U.S.C. §1(e) 2, 4
17 U.S.C. §101(e) 2, 4

Legislative History:

Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 20 (1971) 11

Periodicals:

Comment, Battle Over the Compulsory License: Mechanical Recording of Music, 36 U. Colo. L. Rev. 501 (1964) 11
Diamond, Copyright Problems of the Phonograph Record Industry, 8 Bull. Cr. Soc. 227 (1961) 11
Dubin, Copyright Aspects of Sound Recordings, 26 So. Cal. L. Rev. 139 (1953) 11

Books:

Amdur, Copyright Law and Practice (1935) 11
Ball, Law of Copyright (1944) 11
Howell, The Copyright Law (3d ed. 1952) 11
2 Ladas, The International Protection of Literary and Artistic Property (1938) 11
Nimmer, Copyright (1973) 12
Weil, Copyright Law (1917) 11

Other:

Brief of the United States as *Amicus Curiae* in *Colorado Magnetics, Inc.* v. *Edward B. Marks Music Corp.* (December 1974) 3, 7, 9, 10, 11, 14

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1338

MELODY RECORDINGS, INC., *et al.*,
Petitioners,

vs.

JONDORA MUSIC PUBLISHING COMPANY, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinions of the District Court were reported at 351 F. Supp. 572, 362 F. Supp. 488 and 362 F. Supp. 494 and are included in Appendices A, B and C of the Petition for Certiorari. The opinion of the United States Court of Appeals for the Third Circuit is reported at 506 F.2d 392. That opinion and the Third Circuit's judgment and orders are included in Appendices I through L to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the compulsory license provision of the Copyright Act, 17 U.S.C. §§1(e) and 101(e), applies to the copying of copyrighted musical compositions by means of unauthorized duplication of original sound recordings of such compositions, and thereby bars a claim of copyright infringement by an owner of the composition copyrights who has not consented to such use?

Statutes Involved

This case involves construction of Sections 1(e) and 101(e) of the Copyright Act, 17 U.S.C. §§ 1(e) and 101(e), printed at pages 3 through 5 of the Petition for Certiorari.

Statement of the Case

The very same issue of law raised by this Petition was also the only issue presented in the petition for certiorari which this Court denied just a few months ago in *Colorado Magnetics, Inc.* v. *Edward B. Marks Music Corp.*, —— U.S. ——, 42 L.Ed.2d 819 (Jan. 20, 1975). A petition raising the same issue was also denied previously by this Court in *Duchess Music Corp.* v. *Stern*, 409 U.S. 847 (1972).

In *Colorado Magnetics*, the Tenth Circuit (*en banc*) decided, as had the Ninth Circuit in *Duchess*, that the compulsory license provision of the Copyright Act (17 U.S.C. §§1(e) and 101(e)) did not apply to the copying of copyrighted musical compositions by means of unauthorized

duplication of original sound recordings. *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974); *Duchess Music Corp.* v. *Stern*, 458 F.2d 1305 (9th Cir. 1972).

Before denying certiorari in *Colorado Magnetics*, this Court requested and received a brief *amicus curiae* from the Solicitor General of the United States, which concluded that the Tenth Circuit had "decided the issue correctly and, in the absence of a conflict among the circuits, it is unnecessary for this Court to hear the case." *Brief of the United States as Amicus Curiae* (December 1974), p. 16 (hereinafter cited as "*S. G. Brief*"). Since then, two more United States Courts of Appeals—the Third Circuit in the instant case and the Fifth Circuit in *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir. 1975)—have reached the same result on the identical question of law. Thus, far from a conflict among the circuits or "a chaotic situation" (Pet., p. 8),[1] there is complete unanimity among the circuits on this question and there is even less reason for granting this petition than there was in the *Colorado Magnetics* case.

There are no material differences between the stipulated facts in the instant case and the facts presented to this Court in *Colorado Magnetics*. Here, as in *Colorado Magnetics*, petitioners are engaged in the business of manufacturing and selling under their own labels unauthorized tape duplications of popular phonograph records manufactured by others; that is, not authorized either by the owner of the musical compositions or by the manufacturer of the record.

1. Citations to the Petition for a Writ of Certiorari in this case are designated "Pet." followed by the page number.

Respondent music publishers own the copyrights in several of the musical compositions contained on the recordings copied and sold by petitioners, including such well-known songs as "I Believe," "Blowin' in the Wind" and "Raindrops Keep Fallin' on My Head." Unlike manufacturers of original recordings, petitioners do not hire their own record producers, orchestrators, arrangers, musicians or performing artists, or bear any of the risks or costs of producing original sound recordings of respondents' compositions. Rather, they tape hit performances of those compositions by outstanding artists from commercially available records produced by others, without obtaining authority from anyone, and sell these taped duplications to the public. They thus create nothing new and incur none of the costs of such creation.

As the sole basis for their claimed right to engage in what would otherwise be blatant infringement of the publishers' copyrights, petitioners, as did Colorado Magnetics, relied upon purported compliance with the "compulsory license provision" of the Copyright Act (17 U.S.C. §§ 1(e) and 101(e)). Under that provision, copyrighted musical compositions are protected against copying by means of mechanical recording, except that after the copyright holder or its licensee makes the first use of a composition on a recording, others are automatically entitled to "make similar use," upon compliance with procedures set forth in the statute. The Petition suggests (Pet., pp. 21-22) that because petitioners purported to file Notices of Intent and to tender royalties under the compulsory license provision, they should not be confused with other duplicators who do not bother to do so, and that the result should somehow be different in their case. But, in that respect too, there is no

difference between petitioners and Colorado Magnetics and, indeed, the very issue in both cases is whether Congress ever intended the compulsory license procedures to be available to unauthorized duplicators.

On the publishers' suit to restrain petitioners from infringing their copyrights, the Third Circuit—as did the Ninth and Tenth Circuits before it and the Fifth Circuit after it—construed the phrase "similar use" to mean a use similar to that of the producer of the original recording, who creates a new work of art by the efforts of musicians, arrangers, performers and technicians and incurs the costs and risks inherent in recording original renditions of musical compositions. Four circuits have therefore concluded that unauthorized duplicators such as petitioners, who do none of these things, but merely purchase commercially available recordings of the publishers' copyrighted compositions and duplicate them, are not making "similar use" of the musical compositions—and hence are not entitled to the benefits of the compulsory license provision.

On the basis of that conclusion of law, the Third Circuit reversed the contrary holding of the United States District Court for the District of New Jersey, and remanded for further proceedings consistent with its opinion.

ARGUMENT

I

The decision below is clearly correct and there is no conflict of authority.

Four United States Courts of Appeals which have considered the question raised here have all ruled that the compulsory license provision is not applicable to unauthorized duplication of sound recordings. Those four recent decisions, which are consistent with the earliest constructions of the compulsory license provision, represent the only interpretation which does not do violence to the plain meaning of the statutory language and the objectives which Congress sought to achieve when it enacted that provision in 1909.

Much like the petition for certiorari in *Colorado Magnetics*, the Petition in this case rests upon a confusion between the distinct rights of music publishers in original musical compositions, and those of the manufacturers of sound recordings of performances of those compositions. Thus, the Petition repeats over and over again the proposition that, prior to the Sound Recording Act of 1971, there were no federally-protected rights in sound recordings.

We take no issue whatever with that statement.[2] But, as the Third Circuit and the other circuits recognized, the music publishers are not asserting any right or interest in

2. Nor did the Third Circuit's opinion dispute that point. It held that "until Congress recently provided otherwise, it was generally conceded that a record as such could not be copyrighted." (Pet., Appx. I, p. 108a)

the sound recordings themselves. As the Tenth Circuit properly observed in *Colorado Magnetics*, "we are not here concerned, as such, with the record, and its copying, but with the original composition and the copyright interest therein." (497 F.2d at 290.) As the Tenth and Third Circuits also both recognized (497 F.2d at 288; Pet., Appx. I, p. 107a), the Copyright Act *does* afford the publishers an exclusive right to determine who shall make use of its copyrighted compositions and in what manner. See also *Goldstein* v. *California*, 412 U.S. 546, 563-64 (1973); *Standard Music Roll Co.* v. *F. A. Mills, Inc.*, 241 Fed. 360 (3d Cir. 1917).

The compulsory license provision, upon which petitioners rely, is a very limited exception to the copyright owner's exclusive right in the musical composition. It provides that, after the first authorized use of a copyrighted composition for the making of mechanical reproductions, others may make "similar use" of the composition by complying with the requirements of that provision. The provision would afford petitioners a defense *only* if the specific use made of the publishers' copyrights is a "similar use" which the provision was intended to cover.

Although the statute never expressly mentions tape duplication,[3] the words "make similar use" plainly show that the compulsory license provision is not available to unauthorized duplicators. The first license for recording of a musical composition is necessarily for an original record-

3. Indeed, as the Solicitor General's brief in *Colorado Magnetics* pointed out (*S.G. Brief* at 8, 10-11), the technology which gave rise to today's widespread tape piracy was unknown when the compulsory license provision was enacted in 1909. See *Goldstein* v. *California*, *supra*, 412 U.S. at 566 n. 23.

ing of a live performance of the musical work. The making of a taped duplicate of the original record differs significantly from such first use—and is not at all "similar" to the first use. Thus, the plain meaning of the compulsory license provision is, as the Tenth Circuit held, that one who complies therewith may then use

> "not a third party's record, but the copyrighted composition, which has been characterized as the 'raw material,' in a manner 'similar' to that employed by the recording company which did have authorization from the copyright owner. * * * Magnetics may make its own arrangements, hire its own musicians and artists, and then record. It does not mean that Magnetics may use the composer's copyrighted work by duplicating and copying the record of a licensed recording company. Such, in our view, is not a *similar* use." *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra,* 497 F. 2d at 288.

The Third Circuit in the instant case, after quoting the foregoing holding of the Tenth Circuit, made this point more firmly:

> "We agree with this interpretation of the statute but feel even more strongly that the duplicators or pirates do not 'use' the composer's work in a 'similar' fashion—indeed, they do not utilize the composer's work at all. It is a recording which is used. Rather than permit the use of a recording of the composition, the statute only authorizes the use of the copyrighted work, that is, the written score.
>
> The use to which the original licensee put the composer's work, *i.e.,* the musical score, was much more elaborate, involving as it did the preparation of an arrangement from the written composition and its performance by musicians and vocalists. The mere dupli-

> cation of a recording by the pirate is not the same as, or 'similar' to, the efforts made by the original licensee in utilizing the characters on a piece of paper as the basic plan for producing harmonious sounds." (Pet., Appx. I, pp. 109a-110a.)

And the Fifth Circuit expressed the identical point as follows:

> "A taped duplicate is simply not a 'similar use' of the composition as we understand the words. There is no live performance; in fact, there are no musicians at all. Only a tape recorder is required. The end product, of course, is not only 'similar' but virtually indistinguishable; the process, however, is completely dissimilar. This distinction is not mere musical metaphysics; it is the dividing line between that which the statute commands and that which it forbids. Although appellants 'produce' recordings, they do not make a 'similar use' of appellees' compositions in so doing." *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc., supra,* 507 F.2d at 669-70.

The interpretation given the statutory language by all four circuits is also the only one which carries out the congressional intent. As the Third and Fifth Circuits both noted, the compulsory license provision had two objectives —encouraging a multiplicity of different creative renditions of copyrighted music[4] and the prevention of monopoly. Pet., Appx. I, p. 110a; *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc., supra,* 507 F.2d at 670; see also *S. G. Brief* at 11.

4. As the court said in *Shaab* v. *Kleindienst,* 345 F.Supp. 589, 590 (D.D.C. 1972), the compulsory license provision "promotes the arts by permitting numerous artistic interpretations of a single written composition."

When these objectives are considered, as they were extensively in the briefs and arguments presented below, it is seen that, rather than furthering the objectives underlying the provision, protecting piracy under the shield of compulsory licensing would "devour the general policy" which the statute embodies. *Shilkret* v. *Musicraft Records, Inc.*, 131 F.2d 929, 931 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 (1943); *Spokane & Inland R.R.* v *United States*, 241 U.S. 344, 350 (1916); see also *USV Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 664-65 (1973); *Clark* v *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947) (courts should not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other").

Rather than promoting "numerous artistic interpretations," granting copyright licenses to unauthorized duplicators would only encourage parasitic appropriation of the artistry of others and discourage legitimate record manufacturers from bearing the costs and risks of recording new artistic interpretations. *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc., supra*, 507 F.2d at 670; *Fame Publishing Co., Inc.* v. *S&S Distributors, Inc.*, 363 F. Supp. 984, 988 (N.D. Ala. 1973); see also *Goldstein* v. *California, supra*, 412 U.S. at 550; *Capitol Records, Inc.* v. *Erickson*, 2 Cal. App. 3d 526, 538, 82 Cal. Rptr. 798, 805-06 (1969), *cert. denied*, 398 U.S. 960 (1970); *S. G. Brief* at 11-12. Likewise, applying the compulsory license provision to piracy would not promote competition in the recording industry, but rather would allow duplicators, who make no investment in the process of producing original recordings, to drive legitimate record companies—particularly the smaller ones—from the market place. *Fame Publishing Co., Inc.*

v. *Alabama Custom Tape, Inc., supra,* 507 F.2d at 670; see also *Testimony of Barbara Ringer, Assistant Register of Copyrights, Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. 20 (1971).

There can thus be no serious dispute that the unanimous view of the four circuits is consistent with both of the stated objectives of Congress in 1909, and that a contrary conclusion would have subverted those goals.[5]

The Petition conveys the inaccurate impression that whatever the appellate courts have done, the weight of scholarly opinion is in petitioners' favor. Thus, they interject citations to works by Professors Henn, Chafee, and Nimmer and to a dissenting opinion of Judge Learned Hand in *Capitol Records, Inc.* v. *Mercury Records Corp.,* 221 F.2d 657 (2d Cir. 1955).

To begin with, petitioners completely ignore the decided weight of scholarly comment throughout the six decades since the compulsory license provision was enacted.[6] More-

5. *Aeolian Co.* v. *Royal Music Roll Co.,* 196 Fed. 926 (W.D. N.Y. 1912) reflects the judicial construction given the statute soon after its enactment, which is consistent with that of the four recent circuit decisions. Subsequent criticism of the *Aeolian* decision need not concern this Court, since it has been directed to its clearly erroneous holding that a licensee may sue for copyright infringement, and not to its proper construction of the compulsory license provision.

6. *E.g.,* Ball, *Law of Copyright,* §212, pp. 462-63 (1944); Diamond, *Copyright Problems of the Phonograph Record Industry,* 8 Bull. Cr. Soc. 227, 345 (1961); Comment, *Battle Over the Compulsory License; Mechanical Recording of Music,* 36 U. Colo. L. Rev. 501, 503 (1964); 2 Ladas, *The International Protection of Literary and Artistic Property,* §364, at 791 (1938); Howell, *The Copyright Law* (3d ed. 1952) at 150; Weil, *Copyright Law* (1917) at 421; Amdur, *Copyright Law and Practice,* §6, pp. 329-30 (1935); Dubin, *Copyright Aspects of Sound Recordings,* 26 So. Cal. L. Rev. 139, 141 n. 13 (1953); see also *S.G. Brief* at 13 n. 10.

over, Professors Chafee and Henn go no further along petitioners' path than the publishers themselves have gone: all agree that, prior to 1972, one could not "infringe a record." But there, petitioners leave Professors Henn and Chafee behind, since neither of their works cited in the Petition make any mention of the question raised here, which concerns only infringement of the musical composition copyright.

Likewise, Judge Hand's dissent in *Capitol Records* could not possibly be "directly on point" (Pet., p. 15), since that case involved a dispute among record manufacturers and retailers, not the owners of copyrights in the underlying musical compositions. Indeed, the Court of Appeals held that "since each party by stipulation disclaims ownership in any of the compositions by virtue of copyright, we treat them as in the public domain for the purposes of the case." 221 F.2d at 659.

Petitioners' reliance upon scholarly comment thus boils down to the observations of Professor Nimmer (Nimmer, *Copyright* §108.4621, at pp. 432-33 (1973)), which the Third Circuit noted, but which left it "not persuaded" (Pet., Appx. I, p. 109a). Nimmer does indeed support petitioners' position, but only after acknowledging that such an interpretation of the statute produces a "somewhat astounding result." (*Id.* at pp. 420-21, 431-32.) However, as this Court has often stated, federal statutes should be construed and applied so as to avoid astounding or absurd consequences. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-43 (1940); *United States* v. *Katz*, 271 U.S. 354, 357 (1926); *United States* v. *Kirby*, 7 Wall.

(74 U.S.) 482, 486-87 (1868). Surely, review by this Court is not needed to determine whether the four circuits correctly concluded that the statute did not compel such an "astounding result."

II

The 1971 Sound Recording Amendment and the *Goldstein* decision are not controlling.

As noted, petitioners fail to perceive the crucial distinction between the publishers' asserted rights in musical compositions and wholly different rights in sound recordings. That confusion leads them—like petitioner in *Colorado Magnetics*—into what the Fifth Circuit in *Fame* called "conceptual cul de sacs,"[7] such as the legislative history of the 1971 Sound Recording Amendment and this Court's 1973 decision in *Goldstein* v. *California*, 412 U.S. 546 (1973). But, as the Third, Fifth and Tenth Circuits have all held, neither the 1971 statute nor the 1973 decision are at all relevant.

The 1971 Amendment is not dispositive of the present controversy principally because it was concerned solely with the creation of new proprietary rights in sound recordings, not with underlying compositions. That legislation for the first time gave *record manufacturers* rights and remedies against unauthorized duplicators, but it had no effect whatever on the pre-existing rights of the owners of composition copyrights. Indeed, as all of the circuit court opinions have recognized, the only reason the 1971 Amendment figures in this case is because of references in

7. *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc., supra*, 507 F.2d at 672.

the legislative history indicating the view of some members of Congress or of congressional committee staffs that, prior to that enactment, duplicators were free to take advantage of the compulsory license provisions.

But the Third, Fifth and Tenth Circuits—in almost identical language—all concluded that such references in the 1971 legislative history were not a reliable guide to the construction of the compulsory license provision, which was adopted many years before by another Congress. Pet., Appx. I, p. 112a; *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc., supra,* 507 F.2d at 672; *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra,* 497 F.2d at 289-90; see also *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance' "). As the Solicitor General's *amicus* brief in *Colorado Magnetics* stated: "[I]t is the words and the legislative history of the 1909 Act, and not the misconceptions at a later date, that control the meaning of Section 1(e)." (*S.G. Brief* at 15.)

Likewise, all three Court of Appeals decisions decided after *Goldstein* agreed that this Court in *Goldstein* did not even consider, much less decide, the issue here presented. Pet., Appx. I, p. 111a; *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc., supra,* 507 F.2d at 671 n. 2; *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra,* 497 F.2d at 289.

Nothing in *Goldstein* requires the conclusion that the compulsory license provision sanctions unauthorized du-

plication. This Court there upheld the constitutionality of a state statute making record and tape piracy a crime. It was considering an alleged conflict between federal and state law with respect to the protection of rights in "records, as *renderings of original artistic performance.*" 412 U.S. at 566 (emphasis by the Court). It concluded that the states were free to grant such protection because Congress had "indicated neither that it wishes to protect, nor to free from protection, *recordings of musical performances* fixed prior to February 15, 1972" (412 U.S. at 571) and thus no "conflict between state law and federal law arises in the case of *recordings of musical performances*" (412 U.S. at 570) (emphasis added). Indeed, in analyzing the claims of conflict, this Court took care to point out that under the pertinent California statute "no limitation is placed on the use of the music, lyrics, or arrangement employed in making the master recording" (412 U.S. at 550).

Thus, *Goldstein* would present an obstacle only if the publishers, as erroneously supposed by petitioners, were asserting a protected interest in the sound recordings themselves. But, as already noted, it is not a federal right in records which the publishers assert, but their own rights to prevent infringement of their copyrighted musical compositions. Such an assertion creates no constitutional conflict between federal and state law—and *Goldstein* found none. Indeed, there can be no claim that Congress has not touched the activities here at issue, since the petitioners themselves rely on the compulsory license provision of the 1909 Copyright Act as their sole defense to the claim that they infringed the publishers' copyrights. It is simply the proper construction of that provision which is in controversy, and the four circuits have all rejected the construction urged by petitioners. There is thus no conceivable

conflict between the Third Circuit's holding and that of *Goldstein*.

In the final analysis, it is the intention of the 1909 Congress, as expressed in the plain meaning of the compulsory license provision and the legislative history underlying it, not the 1971 legislation or the 1973 *Goldstein* decision concerning different rights in sound recordings, which disposes of this controversy. As shown, the decisions of the Third, Fifth, Ninth and Tenth Circuits embodied the only reading of the statute which is in harmony with that intention.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
345 Park Avenue
New York, New York 10022

Attorney for Respondents

STEVEN B. ROSENFELD
STEVEN A. COPLOFF
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

C. STEPHEN BARRETT, III
LUM, BIUNNO & TOMPKINS
550 Broad Street
Newark, New Jersey 07102

Of Counsel

May 14, 1975